IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.91 OF 1995

Rejurection Bonifes Fernandes ]
Age 29 years, resident of ]
Sawantwadi, Juna Bazaar, ]
Taluka Sawantwadi, Dist. ]
Sindhudurg ]..Appellant

Versus

The State of Maharashtra ]..Respondent

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Mr.Sachin B.Shetye, Advocate for the Appellant
Mr.A.S.Shitole, A.P.P. for the State.

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**CORAM: SMT.V.K.TAHILRAMANI,J.**

**DATE : OCTOBER 27,2004**

**ORAL JUDGMENT:**

1. Through this appeal, the appellant-original accused challenges the judgment and order dated 28th February, 1995, passed by the learned IInd Additional Sessions Judge, Sindhudurg at Sawantwadi in Sessions Case No. 67 of 1994. By the said judgment and order, the learned Additional Sessions Judge convicted the appellant under Section 376 of IPC and sentenced him to R.I. for seven years and to pay a fine of Rs. 5,000/- i/d R.I. for one year.

2. Briefly stated the prosecution case is as under:

. Namrata Name the prosecutrix is a Beautician by profession and she used to work at Sawantwadi. The complainant P.W.3 Namrata Name was residing at Sawantwadi in the rented premises belonging to P.W.7 Ratnamala Avod, her family consisting of P.W.4 Archana Avod, P.W.6 Soloman Avod and others. P.W.10 Pushpa Name i.e. mother of the Namrata and grand-mother of Namrata were the only family members in the house of Namrata.

. On 23rd May, 1994 at about 4 p.m. when Namrata was sleeping in her room with her grand mother who was extremely old and feeble, the appellant entered into room. At that time, P.W.6 Soloman son of the landlord came there and enquired from the appellant as to how and why he had entered in the room. Thereupon, some altercations took place between Soloman and the appellant. Thereafter, the appellant sat on the compound wall infront of the building. Namrata Name went to the appellant and pacified him and requested him not to quarrel. Thereupon, the appellant took out knife, put it on the back of Namrata and asked her to accompany him. The appellant then took Namrata to Narendra Hill at the point of knife. At Narendra Hill, the appellant committed rape on Namrata. Thereafter, Namrata Name

came home. Thereafter, Namrata lodged her complaint (Exhibit-13) before the police and the investigation commenced. After completion of investigation, the charge sheet came to be filed. After completion of investigation, the charge sheet came to be filed.

3. In due course, the case was committed to the Court of Sessions. The charge came to be framed against the appellant under Sections 376, 451 and 506 of IPC. The appellant pleaded not guilty and claimed to be tried. The defence of the appellant is that of total denial and false implication. It is further his defence that there was enmity between him and the family of Avods in whose house the prosecutrix Namrata was residing. In fact, on the day of incident also, the appellant had lodged a N.C. against P.W.6 Soloman Avod. On account of this enmity, the Avod family instigated Namrata who was their tenant to file a false complaint against the appellant.

4. During the course of trial, the prosecution examined eleven witnesses. Out of the said witnesses, the star witness is P.W.3 Namrata Name. After going through the evidence adduced by the prosecution, the learned Judge acquitted the appellant of the offences under Sections 451 and 506

of IPC. However, the learned Judge convicted the appellant for the offence under Section 376 of IPC and sentenced the appellant in the manner stated in para no.1 above. Hence, this appeal.

5. I have heard Mr.Sachin Shetye, the learned advocate appearing for the appellant and Mr.A.S.Shitole, the learned A.P.P. appearing for the State. I have also perused the entire material on record. After utmost circumspection, I have reached the conclusion that this appeal deserves to be allowed.

6. The conviction of the appellant is mainly founded on the evidence of P.W.3 Namrata Name. For the reasons stated hereinafter, in my view, I do not find her evidence to be totally reliable. I shall now proceed to take up the evidence of P.W.3 Namrata Name.

7. Namrata Name has stated in her examination-in-chief that the appellant had entered her house. Thereafter, P.W.6 Soloman questioned him as to how and why he entered the room. There was altercation between the two of them. Thereafter, the appellant sat on the compound wall infront of the building. She went near the appellant and tried

to pacify him and requested him not to quarrel. Thereupon, the appellant removed knife, put it on her back and asked her to accompany him. The appellant then took her to Narendra Hill and there he committed rape on her. It is pertinent to note that it is the case of Namrata that she was forced to accompany the appellant to Narendra Hill as he had put a knife on her back. However, in her F.I.R. there is no mention of any knife or of the fact that the appellant at the point of knife, took her to Narendra Hill. Thus the reason put forward by Namrata for going with appellant to Narendra Hill, appears to be false. In such case, when there was no knife with the appellant there was no question of Namrata being forced to accompany the appellant to Narendra Hill. Moreover, according to the prosecutrix, the distance between her house and the spot where the rape took place, is about one and half kilometre. On the way there were houses of many people. The prosecutrix has admitted that house of one K.T. was at a distance of five feet from where she was standing. It has also come in the evidence of other witnesses that there were large number of houses on the way to Narendra Hill. P.W.4 Archana Avod has stated that while leading to Narendra Hill adjoining to their house, there is house of one Martin Fernandes. Near the point where

the short-cut starts there are houses of Kamat wherein there are number of Government offices. At the top of Narendra mountain, there is house of one Korol and there are Government quarters. This incident had taken place at about 5 p.m. i.e. in broad day light. P.W.4 Archana Avod has also stated that in the month of May, Narendra Hill is crowded. In such case, it is difficult to imagine that at about 5 p.m. i.e. in broad day light, the appellant could take Namrata with him forcibly all the way from her house to Narendra Hill.

8. The averment that the appellant was carrying a knife is an improvement. Thus, it is clear that the appellant was not carrying any weapon. In such case there was no reason for Namrata to be frightened or for not putting up any resistance. Namrata has not raised any shouts or put up any resistance. In fact, houses of K.T. and Martin Fernandes were adjoining to the house of Namrata Name. However, she did not call out for any help. As observed earlier, Namrata has not stated in her complaint that the appellant was carrying a knife and at the point of knife, he took her to Narendra Hill. It has also come in the evidence of prosecutrix that they were walking side by side to Narendra Hill. Thus, it seems impossible to believe that the

appellant forcibly took the prosecutrix to Narendra Hill. It is also pertinent to note that at the spot where the incident took place at Narendra Hill, there are small stones and thorns etc. However, no injuries not even minor abrasion or scratch have been noticed on a back and buttocks of prosecutrix. Had it been a case of rape and as the area was covered with small stones and thorns, there would have been at least some minor abrasion or scratch on the back or buttocks of prosecutrix. In her examination in chief, Namrata Name has stated that appellant beat her and caused injuries to her. This has also been found to be an improvement in her deposition. In the F.I.R. she has not mentioned that there was any beating or regarding any injury. It appears that Namrata Name is not in habit of stating truth. This is evident from the fact that she has stated in her deposition that she did not know appellant prior to the incident and she did not know his name on the date of incident and she came to know the name of the appellant after the incident as it was informed to her by the daughter of Avod. However, it has come on record in the deposition of her mother i.e. P.W. 10 Pushpa Name that prior to their becoming tenants of Avod, for about four months they were tenants of the appellant. Namrata was also residing with her at that time and they

were knowing all the inmates of the house of the appellant. Thus, the statement made by Namrata Name is totally false. From these facts, it is clear that Namrata Name knew the appellant prior to the incident as she was residing in his house as a tenant and it appears that the sexual intercourse has taken place by consent. This is also borne out by the fact that Namrata Name did not initially lodge her complaint with the police but it was Mr.Avod and P.W.7 Mrs.Ratnamala Avod who went to the police station and narrated the facts. Thereafter, Namrata was called to the police station and her complaint came to be recorded.

9. It is no doubt true that injuries were found on the person of Namrata Name which are suggestive of the fact that sexual inter course had taken place some time prior to Namrata being examined by P.W.8 Dr.Indu Sangle. However, Dr.Sangle has not mentioned the age of the injuries found on the person of Namrata Name. Dr.Sangle has specifically stated that there was no injury on the back or buttocks of Namrata Name. She has further stated that she did not find semen on the person of Namrata Name. Looking to the facts stated above, assuming that sexual inter course had taken place it appears to be a case of sexual intercourse with consent.

For the said reasons, I feel that this is a fit case wherein the appellant should be extended the benefit of doubt.

9. In the result, this appeal is allowed. The conviction and sentence of the appellant under Section 376 of IPC recorded by learned IInd Additional Sessions Judge, Sindhudurg at Sawantwadi dated 28th February, 1995 in Sessions Case No. 67 of 1994, is set aside and the appellant is acquitted thereunder. The fine amount if any, paid by the appellant, be refunded to him. The appellant is on bail. His bail bonds shall stand cancelled.

[V.K.TAHILRAMANI.J]